Supreme Court of the United States

OCTOBER TERM, 1951.

No. 661.

C. B. KING, JOHN H. GERKEN AND M. F. PAFFORD,
PETITIONERS,

VS.

J. BRADLEY STREIT AND A. W. WALLACE,
RESPONDENTS.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

HISTORY OF THE CASE.

This is a simple suit for the specific performance of a contract to sell stock in a corporation. It involves about $2,000,000. Otherwise it has no unusual features. It contains no intricate propositions of law or complicated questions of fact. It involves no constitutional or other federal questions.

The First Contract.

On February 8, 1950, the petitioners jointly signed the following letter addressed to the respondent, J. Bradley Streit:

> "We acknowledge receipt of your check in the amount of $10,000.00 to apply on the purchase of approximately 440,000 shares of the capital stock of Maule Industries, Inc. at a net price of $2.75 per share and first mortgage bonds of Maule Industries, Inc. in an amount to be determined within fifteen days at a price of par plus interest to date of transfer.[1]
>
> "It is understood and agreed that you will deposit with the Miami Beach First National Bank, Miami Beach, Florida, sufficient funds to pay for the above listed securities on or before March 10th, 1950, at which time the transaction is to be closed, and you are to have the right to elect a majority of the board of directors.
>
> "In the event you fail to make payment for the above securities on the above date, the $10,000.00 deposit mentioned in your letter is to be forfeited as liquidated damages." (Plaintiffs' Exhibit No. 1, R. 126.)

The Second Contract.

On March 9, 1950, they addressed the following letter to A. W. Wallace and J. Bradley Streit, the respondents:

---

[1]The exact number of bonds was set forth in a separate letter (Plaintiffs' Exhibit No. 3, R. 127).

All record references are to the printed transcript. In every case emphasis is supplied unless otherwise noted.

"We agree to sell to you on or before July 1, 1950 approximately three Hundred thousand (300,000) shares of Maule Industries Inc stock at a price of $2.75 per share payable in cash at time of closing.

"This agreement to sell to you the aforesaid stock is made with the understanding that the stock will be voted by a voting trust—the terms of which shall be along the lines discussed at tonight's conference and shall be mutually agreeable to you and ourselves. The voting trust shall be formally entered into simultaneously with our sale of said stock.

"The consideration for this agreement is the cancellation of agreement dated Feb. 8, 1950 by J. Bradley Streit—which agreement has been cancelled by separate instrument." (Plaintiffs' Exhibit No. 4, R. 128.)

The Release.

The "separate instrument" which is referred to in petitioners' and in respondents' brief as the "release" was executed simultaneously with the second contract and appears in the record as "receipt of March 9th, 1950 signed by J. Bradley Streit" (R. 166).

The Proceedings Below.

On June 23, 1950, the respondents filed a bill of complaint (R. 12-15) in the Circuit Court of Dade County, Florida against the petitioners alleging the making of these agreements, that Streit was ready, willing and able to perform the first one and so informed petitioners prior to its expiration date, and that petitioners sought a modification of it and made the second agreement. The bill

further alleged that the respondents desired to perform this agreement within the time specified and to avail themselves of its benefits, that they sought to induce the petitioners to perform it, had prepared and tendered a form of voting trust agreement, the terms of which were in accordance with the conference between the parties, spent considerable time and money arranging to finance it, and at all times had been ready, able and willing to perform and so advised the petitioners, but the latter wholly failed and refused to carry it out and repudiated it. Respondents averred that they were willing to carry out either contract, that the former had a peculiar value because it gave control of the corporation, and the latter had a peculiar value because the respondents hold or control additional stock which would enable them to control it.

The petitioners moved to dismiss the bill. The Court overruled these motions and required them to answer (R. 20, 29). After answering (R. 20-23), they filed a motion for summary decree, which was denied (R. 29).

The Florida Supreme Court denied certiorari (R. 30) (51 So. 2d 196).

On final hearing before the Chancellor the bill was dismissed (R. 199) for the reasons given by him in his opinion (R. 195-199).

The respondents appealed (R. 199-200). The Florida Supreme Court reversed (R. 202-205) (54 So. 2d 522). A petition for rehearing was denied (R. 222-223). Thereupon the Chancellor vacated his former decree and entered a final decree "in accordance with the mandate of the Supreme Court of Florida" whereby the petitioners

were required to deliver to the respondent Streit the 440,000 shares of the common stock of Maule Industries, Inc. and the whole issue of its first mortgage bonds[2] endorsed so as to vest title to the stock and bonds in Streit free and clear of all liens and encumbrances, whereupon Streit was required to pay for the stock and the bonds (R. 252-253). The petitioners took an appeal from this decree (R. 253-254), but the Court quashed the appeal "as the questions raised in said appeal were decided in the former appeal of this cause" (R. 273). At the same time the Florida Court denied an application for supersedeas which petitioners sought in an effort to obtain a review by this Court (R. 281). One of the Justices of this Court refused a like application. After the Florida Supreme Court quashed the petitioners' appeal from the Chancellor's decree that was entered upon its mandate, the petitioners *complied with the decree* by producing 431,442 shares of the common stock of Maule Industries, Inc. and $591,600. of its first mortgage bonds, which the respondents accepted and delivered to the Court a cashier's check of The First National Bank of Miami payable to the petitioners in the sum of $1,789,282.94. The Court made an order directing delivery of the bonds and certificates for the shares of stock so produced to Streit and decreed that upon the payment of costs "the defendants, C. B. King, John H. Gerken and M. F. Pafford, will have complied with the Final Decree of November 15, 1951" (R. 302-303). The petitioners applied to the Florida Supreme Court for

---

[2]Under the decree petitioners were permitted to retain $150,000. in accordance with their contract, but they did not elect to do so.

certiorari to review this order, but their petition was denied (R. 307).[3]

Although the petitioners had delivered to the respondents the stock and bonds that were the subject matter of the contract of sale, they, as officers of the corporation, refused to transfer the stock on the company's books. Upon the respondents' application (R. 314-318) the Court issued a rule to the petitioners directing them to forthwith transfer upon the company's books the 431,442 shares of common stock of Maule Industries to J. Bradley Streit and to issue to him and in his name new certificates therefor and deliver them to him immediately or show cause on a day fixed why they fail and refuse to do so (R. 321). The petitioners filed a return to this rule that set forth numerous and specious reasons for their refusal to transfer the stock (R. 322-323), which the Court held was insufficient and announced that he would adjudge the petitioners to be in contempt but gave them the privilege of purging themselves on immediate compliance with the decree (R. 326). "Compliance," said the Court, "means doing everything that is necessary to effect a transfer of the shares of stock involved to the plaintiff Streit so that he may have and enjoy full ownership and all the rights incident to such ownership, including the transfer on the books of the corporation of the stock to him." The petitioners applied to the Florida Supreme Court for a writ of certiorari to review this order, but their petition was denied (R. 328).

---

[3]On December 21, 1951, the petitioners renewed their application to one of the Justices of this Court for a stay order. It was again refused.

Invoking jurisdiction under Title 28, Section 2157(3), United States Code, because of the alleged denial by the Supreme Court of Florida of rights claimed by them under the Constitution of the United States, the petitioners have applied for a writ of certiorari to review nine orders of the Florida courts.

ARGUMENT.

I. There Is No Federal Question Involved in This Case.

There is no Federal question in this case. The petitioners have had a full and complete hearing of their case in conformity with standards of the due process clause. They have been accorded the same treatment that other litigants in Florida courts have received. There has been no denial of the equal protection of the laws.

Rule 38 of this Court indicates the character of reasons which will be considered by it in granting a review on writ of certiorari where there are special and important reasons therefor. The applicable subsection of this rule is

> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

In spite of their vigorous effort to manufacture a federal question the petitioners have wholly failed to bring their case within the rule.

The basic question in this case is one of state contract law. The respondents sued the petitioners to compel the specific performance of a contract that petitioners admittedly made for the sale of corporate stock. Petitioners contend that rights guaranteed by the Federal Constitution were invaded in these proceedings. They also contend

these rights were violated by a decree requiring them to deliver the stock to the purchasers upon payment of the agreed price because the Court had power under general principles of equity jurisprudence to punish violations of its decree by contempt proceedings, although no such proceedings were commenced as they voluntarily complied with the decree by delivering the stock.

The Chancellor, after an analysis of the facts and documents presented at the trial held that the respondent, Streit, relinquished his rights under the first contract in consideration of the second contract and that the first contract should be enforced if the second contract was void for lack of consideration (R. 197-198). The Chancellor held that a conditional promise was good consideration and that therefore the second contract was not void for lack of consideration. The Chancellor concluded that Streit, in relinquishing his rights under the first contract, acted in consideration of a conditional promise and that this conditional promise was all he was entitled to receive. Under the rule of law adopted by the Chancellor the performance of the second contract by the petitioners was excused when this condition was not satisfied.

The Supreme Court of Florida specifically rejected the theory of law adopted by the Chancellor and the authorities relied on by him. The Court held that the conditional promise was the very pith of the second contract and that, with the failure of the petitioners to take action to bring about this condition, the consideration for the second contract failed. This being the case, the Florida Supreme Court held that the first contract was "still in effect and

subject to enforcement" * * * (R. 205). Upon remand, the Chancellor entered a decree enforcing the first contract.

This summarizes the main steps in the case. Petitioners filed countless motions and appeals at every step in the proceedings. Most of their arguments of arbitrary action by the state courts of Florida are based on rulings in connection with motions or appeals that either were without merit or premature or were attempts to re-argue points which had previously been ruled upon. Petitioners have had a full and complete opportunity to present their case to the Florida courts and those courts have held that the respondents are entitled to enforcement of the first contract on the basis of the facts and state law.

No case can be cited to sustain the existence of a federal question in this set of facts. In one of the cases cited by petitioners this Court said that the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights for which the constitutional protection is invoked. *Anderson National Bank* v. *Luckett,* (1944) 321 U. S. 233.

Surely the petitioners cannot complain of the opportunity afforded them to be heard in this case. At the initial hearing they were given a full opportunity to present their case and all of their evidence to the Chancellor *who decided in their favor* (R. 199). Petitioners had a complete hearing of their contentions before the Florida Supreme Court, including consideration of oral argument, briefs, and a petition for rehearing. Further hearings were had before the Chancellor upon entry of the decree (R. 244)

and before the Supreme Court of Florida upon the appeal from this decree (R. 273).

In another case cited by the petitioners it is held that the intepretation by the courts of a state of written and unwritten laws of the state is not reviewable by the Supreme Court of the United States, and the mere fact that a state court has rendered an erroneous decision on questions of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on the Supreme Court of the United States. *Brinkerhoff-Faris Trust & Savings Company* v. *Hill,* (1930) 281 U. S. 673. To confer jurisdiction on the federal courts, the federal question must be real and substantial and not colorable or frivolous, and must really appear and not be by mere inference or suggestion (*Hanford* v. *Davies,* (1896) 163 U. S. 273; *Western Union Telegraph Co.* v. *Ann Arbor R. Co.,* (1900) 178 U. S. 239), and must be an essential or integral part of the case (*Tennessee* v. *Union & Planters' Bank,* (1894) 152 U. S. 454; *Shulthis* v. *McDougal,* (1912) 225 U. S. 561).

Mere references to the Federal Constitution, laws or treaties and mere assertions that a federal question is involved are insufficient to confer jurisdiction. *Starin* v. *New York,* (1885) 115 U. S. 248; *O'Callaghan* v. *O'Brien,* (1905) 199 U. S. 89; *Lambert Run Coal Co.* v. *Baltimore & Ohio R. Co.,* (1922) 258 U. S. 377. In an exhaustive review of the subject and the adjudicated cases this Court held, in *Eilenbecker* v. *District Court of Plymouth County, Iowa,* (1890) 134 U. S. 31, that the right of a court to punish a

party by summary proceeding and without trial by jury did not violate the due process clause of the 14th Amendment.

With these principles in mind, a careful examination of petitioners' various claims demonstrates clearly that no federal question is involved in this case. As the Court said in *O'Callaghan* v. *O'Brien, supra,* rights asserted under the Constitution of the United States may be so wholly wanting in merit as not to afford the basis of the exercise by it of its appellate jurisdiction.

There was never any claim made by the petitioners that any federal question was involved until the case had been completed before the Chancellor, briefed and argued on appeal, and decided against them. Then in the course of a petition for rehearing they said that the enforcement of a contract "which the parties had never entered into"[4] violated their property rights in contravention of the 14th Amendment because the parties had executed a release of the contract. The Florida Supreme Court merely held that the consideration for releasing the first contract was the making of the second one, and when the petitioners refused to perform the second contract the consideration for the release of the first one failed. Even assuming that this point was raised at the first opportunity, it is impossible to see how any federal question could arise out of these facts and this holding.

---

[4]Their answer admitted that they made the contract but claimed they had been released from it (R. 21). Erroneous factual statements made in the petition in connection with this claim are discussed in detail in Paragraph 2 of the appendix.

Repeatedly throughout the petition it is said that the decree requiring the petitioners specifically to perform their contract to sell and deliver the stocks and bonds of Maule, Industries, Inc. was made under threat of commitment for contempt upon their failure to do so. This is wholly untrue and there is no support in the record for it. At no time did the Court ever threaten to commit the petitioners for contempt. They are unable to point out anything in the record to that effect, except their own uncorroborated statement in a motion for certification of the proceedings (R. 304) that the Court denied (R. 305), which meant that it was not correct.

After the stock and bonds had been delivered by the petitioners to the respondents pursuant to the decree, request was made to transfer the stock on the books of the company, which was refused upon instructions of petitioner King who was president of the company. It was necessary for the respondents to apply to the Court for assistance to protect its decree. The Court issued a rule to the petitioners requiring them to have the stock transferred to respondents or "show cause why they failed to do so." The Chancellor found the petitioners' response to this rule insufficient and said that they were in contempt of court. He added, "I will give them the privilege of purging themselves of contempt on immediate compliance with such decree" (R. 326). They purged themselves by having the stock transferred to the respondent Streit and registered in his name.

The record is devoid of any other reference to citing the petitioners for contempt or committing them, although

equity courts from time immemorial have exercised the power of enforcing their decrees by contempt proceedings. *Eilenbecker* v. *District Court, supra.*

In the case of *State* v. *Thomas,* (1906) 74 Kan. 360, 86 P. 499, the defendant was convicted of contempt by violating a temporary injunction, and on appeal his conviction was affirmed by the Supreme Court of Kansas. A writ of error from the Supreme Court of the United States was dismissed for want of jurisdiction. *Thomas* v. *Kansas,* (1907) 205 U. S. 536.

Petitioners' argument would make a Federal constitutional question out of every court decree for specific performance and out of every court order by which a court directs an individual to conform to its rulings. This is absurd. This Court has always recognized the power of courts to enforce their decrees. See *Wise* v. *Mills,* (1911) 220 U. S. 549, and *Wise* v. *Henkel,* (1911) 220 U. S. 556.

Petitioners make much of the fact that they did not personally own all the shares they contracted to sell. In this connection, it is complained that the Chancellor at the original hearing before him restricted the hearing so as to exclude the issue of petitioners' ownership of the stock although this defense was "duly pleaded and repeatedly urged." This is not correct. The answer of defendants (R. 20-23) at no place avers that petitioners were not the owners of the stock and bonds and could not acquire them. The transcript of the proceedings before the Chancellor (R. 35-195) is destitute of any suggestion that the hearing was in any way restricted.

Petitioners also say that the decision in this case purports to bind persons who are not parties. This is not

correct. The decree requires the petitioners to produce only the stock which they had contracted to produce. The decree requires nothing of any other person. Petitioners are incorrect in stating that it does purport to do so. Whether or not petitioners themselves owned a sufficient amount of stock is immaterial to this Court. So is the question of their authority to act for other owners of the stock.

If the petitioners had wished to raise the point that they did not own the stock that they agreed to sell, they should have done so in their answer. After that they waived it.[5] When the decree was entered requiring them to produce the stock and bonds in court, they should have told the Court they did not have them and could not get them. This, of course, could have been proved to be false. Instead they went out and got the stock and bonds and delivered them, and the respondents accepted them and paid for them. That, it seems to us, is the end of the chapter.

"We may summarily dispose of the defense of impossibility of performance. It is a matter of state law * * *" *Regents of Georgia* v. *Carroll*, (1950) 338 U. S. 586, 594.[6]

Petitioners also say that they were deprived of property without due process of law because of the rulings of

---

[5]Florida Equity Rule 33(h) provides: "A party shall be deemed to have waived all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply . . ." This is substantially identical with Federal Rule 12(h).

[6]This case also involved a stock purchase contract.

the trial court and the state Supreme Court on various motions and appeals. Petitioners claim that they were denied a hearing on certain defenses. The record shows that all defenses raised by the petitioners were considered. Petitioners have simply misinterpreted the record. In some cases the defenses were clearly frivolous; in other cases they had been previously ruled upon. The Florida courts held that these defenses now asserted by the petitioners were insufficient as a matter of law on the basis of facts found by the court. Due process of law does not require a court to discuss or write an opinion on each and every ruling and decision which it renders.

Petitioners also argue that they were denied the equal protection of the laws on the ground that they were not given the same rights of appeal in their case as those granted other litigants in Florida courts in Chancery cases. This claim, likewise, is wholly without foundation. Petitioners did have a complete hearing on their appeal to the Supreme Court of Florida in accordance with Florida procedure. *After* the opinion of the Supreme Court of Florida had been rendered and pursuant to that court's mandate, the trial court entered a decree granting enforcement of the first contract in accordance with the following statement in the opinion of the Florida Supreme Court:

> "Since this is the case the first contract is still in effect and subject to enforcement. * * *" (R. 205).

Petitioners urge that the Florida Supreme Court quashed their appeal from this decree that was entered

pursuant to its mandate without giving them a hearing. This is not so. After hearing argument from counsel for both parties, the Florida Supreme Court quashed the appeal on the grounds that "* * * the questions raised in said appeal were decided in the former appeal of this cause" (R. 273 and R. 289).[7] The Court knew that the petitioners were trifling with it and refused to permit them to do so. In these circumstances petitioners have been accorded the same rights of appeal accorded to all other litigants in the Florida courts who are similarly situated.

II. The Petition for Certiorari Was Not Timely Filed.

A writ of certiorari intended to bring a judgment in a civil action before the Supreme Court for review must be applied for within ninety days after the entry of such judgment (Title 28, Section 2101(c), United States Code). This provision is applicable to appeals from state courts (Section 2104).

June 23, 1950 — Respondents filed a bill in the Circuit Court of Dade County, Florida, to compel the specific performance of a contract made by them with the petitioners for the sale of the controlling interest of the capital stock and bonds in a closely held corporation (R. 12-15).

---

[7]Section 59.33, Florida Statutes, 1951, cited by the Florida Supreme Court in its order reads as follows:

"Appellate courts shall have power to quash appeals in all cases in which appeals do not lie, or where they are taken against good faith or merely for delay, and may decree in such case damages against the appellant not exceeding ten per cent."

January 8, 1951	The Florida Supreme Court denied petitioners a writ of certiorari to review the order of the Chancellor refusing to dismiss the bill or to enter a summary decree in their favor (*King* v. *Streit*, (1950) 51 So. 2d 196) (R. 30).
April 2, 1951	The Chancellor, after hearing the evidence of the parties, found for the petitioners and dismissed the respondents' bill of complaint (R. 195-199).
August 24, 1951	The Supreme Court of Florida reversed the Chancellor's decree in petitioners' favor (54 So. 2d 522) (R. 202-205).
November 6, 1951	The Supreme Court of Florida denied a rehearing and issued its mandate (R. 222-223).
November 15, 1951	The Chancellor, "in accordance with the mandate of the Supreme Court of Florida," vacated the decree entered by him in favor of the petitioners and entered one in favor of the respondents directing the specific performance of the contract by the petitioners (R. 252-253).
November 27, 1951	The Supreme Court of Florida quashed an appeal taken by the petitioners from the final decree entered by the Chancellor pursuant to its mandate, "as the questions raised in said appeal were decided in the former appeal of this cause" (R. 273).

It is apparent from the opinion (R. 202) of the Supreme Court of Florida (on which a rehearing was denied on November 6, 1951) that the Appellate Court at that time had in fact fully adjudicated all rights of the parties and that the adjudication was not subject to further review by a state court. This left only a ministerial act for the Chancellor to perform. This is confirmed by the action of the Florida Supreme Court in quashing the appeal from the decree because all the questions raised "were decided in the former appeal."

In these circumstances, the judgment of the Florida courts became final on November 15, 1951, when the Chancellor entered his decree in conformity with the mandate of the Supreme Court of Florida. The time for applying for certiorari to the Supreme Court of the United States therefore began to run on that date.

Department of Banking v. *Pink*, (1942) 317 U. S. 264, rehearing denied 318 U. S. 802.

Cole v. *Violette*, (1943) 319 U. S. 581, rehearing denied 320 U. S. 810.[8]

---

[8]Strictly speaking, under the cases cited, the time for applying for certiorari began to run from November 6, 1951, when the Supreme Court of Florida denied a rehearing and issued its mandate. However, this mandate required further action by the court below, as the Florida Supreme Court gave the respondents the option to enforce either the first or the second contract. They elected to enforce the first (R. 244). This then required the entry of a further order by the Chancellor, which was entered on November 15th. That it is clear that this was perfunctory only after the option had been exercised is borne out by the language used by the Florida Supreme Court in quashing the appeal from the decree entered by the Chancellor pursuant to the mandate.

The facts summarized above clearly indicate that the petition here is not timely under the test set forth in the cited cases. Petitioners' actions in this litigation subsequent to November 27, 1951 demonstrate the appropriateness and necessity of applying the rule of the cited cases to this case. For, after that date, petitioners filed numerous other petitions in the Supreme Court of Florida (See R. 274, R. 281, R. 307, and R. 309). Having exhausted their state remedies, petitioners decided to exhaust the state court. Petitioners should not be able to extend the time in which they must file in this court by continuing to file a varied assortment of documents in the state court. Petitioners' rights having been adjudicated, they should have filed their petition (or secured an extension of time for its filing) within ninety days of November 15, 1951.

On February 13, 1952, the ninety-day time limit for applying for a writ of certiorari expired.[9]

The petition for certiorari was filed March 19, 1952. It was more than a month too late.

---

[9]The petitioners procured an *ex parte* order from one of the Justices of this Court on March 17th extending the time for filing a petition for certiorari until April 10th. However, as the time had expired when the application for the extension was made, the order granting the extension was ineffective to confer jurisdiction. *Robertson & Kirkham Jurisdiction* of the Supreme Court of the United States (2nd Edition, 1951) Section 415, page 828 *et seq.*; *Finn* v. *Railroad Commission of California*, (1932) 286 U. S. 559; *Cresswell* v. *Tillinghast*, (1932) 286 U. S. 560; *Cherami* v. *Cantrelle*, (1932) 287 U. S. 568.

Where an extension had been obtained wherein counsel unknowingly cited erroneous judgment date and the time had actually expired prior to presentation of the application, the extension was ineffective. *Carleton Screw Products Co.* v. *Fleming*, (1942) 317 U. S. 634.

CONCLUSION.

The petition contains many inaccuracies and makes use of "straw men" in a desperate attempt to fashion a Federal question. The most flagrant of these errors are discussed in the Appendix. The respondents of course recognize that court action is state action, but this principle does not of itself transform a question of state law into a Federal constitutional question unless there is some deprivation of a Federal constitutional right. There was none here. The petitioners made a contract and tried to get out of it. The state courts, after careful analysis of all the facts, held that this contract was still subject to enforcement. Petitioners have had a full and complete hearing and their case presents no problem meriting the attention of this Court.

Moreover, petitioners have not complied with jurisdictional requirements as to the time in which the petition must be filed under the tests set forth in the opinions of this Court.

It is respectfully submitted that the petition for certiorari should be denied.

ROBERT H. ANDERSON,
Miami, Florida,
Attorney for Respondents.

APPENDIX.

Factual Statements in the Petition for Writ of Certiorari Not Supported by the Record.

1. It is complained that the bill of complaint did not allege that the defendants owned the stock when they made the contract. The general rule is that the bill of complaint need not allege defendant's ability to perform (58 C. J. 1167). His inability to perform is a matter of defense which must be pleaded and proved (58 C. J. 1175). *The defendants in the court below did not raise the point.* The motions to dismiss the bill (R. 16-20) will be searched in vain for any ground based on the failure to allege ownership of the stock by the defendants. Their petition for certiorari to the Florida Supreme Court to review the order denying the motion to dismiss nowhere complains of the absence of any such allegation in the bill (R. 1-11).

Not only that, but the petitioners' counsel stated in open court to the Chancellor as late as the entry of the second final decree:

> "Counsel knows that 440,000 shares of stock are not owned by these defendants in their own names. They know that for (*sic*) the record. That stock has to be assembled, produced. *We are not raising that as an issue, understand, as a defense to your Honor's decree,* but there are things which we have to do in the assembly of this stock, and we think there is an honest desire on the part of our clients to have the Supreme Court of Florida review the decree your Honor entered." (R. 263)

In their brief in support of their petition to the Florida Supreme Court for certiorari it is said:

> "The business, Maule Industries, was founded in 1914 by the late Evert P. Maule. It was initially operated as Maule-Ojus Rock Company, and later, for a number of years, as a partnership composed of Evert P. Maule and Kathryn C. Maule, his wife. However, a few years ago, following Mr. Maule's death, the business was incorporated under the name of Maule Industries, Inc. Upon such incorporation, members of the Maule family, including Mrs. Maule and the husbands of her daughters became the principal stockholders. Mrs. Maule was, and is, Chairman of the Board of Directors. Her son-in-law, C. B. King, petitioner, became and is President of the company, and John H. Gerken, petitioner, also a son-in-law, became and is Treasurer thereof.
>
> * * *
>
> "On that basis, and without advice of counsel, the parties entered into a tentative and informal agreement under which Mr. Streit agreed to buy *from the members of the Maule family* approximately Four Hundred Forty Thousand (440,000) shares of the capital stock of Maule Industries, Inc., and approximately $1,000,000.00 worth of the company's mortgage bonds; at least, Mr. Streit made a 'binder' deposit in that behalf, in the sum of Ten Thousand Dollars ($10,000.00)."

This statement was repeated twice in briefs at later stages of the proceedings.

The truth of the matter is that the owners of the 440,000 shares of stock and the bonds (except the petitioner Pafford) were members of the Maule family. (R.

80-81, 89, 96, 99, 100) King and Gerken, the sons-in-law, were acting for their wives and their mother-in-law as their duly authorized agents. The mother-in-law, the wives, and everybody else knew all about the agreement and had approved it. That is why no such defense was raised; it could not have been sustained. Counsel in this case know that. One member of counsel was a director of the Maule company and a stockholder. This is a sheer afterthought—a grasping at straws.

When the Chancellor, upon the mandate of the Supreme Court of Florida, directed the petitioners to deliver the stock and bonds to the respondents, they went out and collected from the other members of the family group (except from one who had died) the certificates covering the shares of stock and the bonds that originally were contracted to be sold. (R. 80-81, 89, 96, 99, 100) They brought them into court and delivered them to the respondents who paid for them and accepted them. The stock has been transferred on the books of the company to Streit and he has endorsed the stock and delivered it and the bonds to McDonald & Company, of Cleveland, Ohio, who put up the money to pay for them. Under the provisions of the Uniform Stock Transfer Act, which is in effect in Florida, (Chapter 614, Florida Statutes 1951) McDonald & Company acquired a good title.

2. In several places in the petition the statement is made that the bill of complaint failed to allege that the respondents had released the petitioners from the first contract which was ultimately enforced with the insinuation that the respondents were attempting to suppress some material fact. It would be a complete answer to say that

this was a matter of defense, but as a matter of fact the bill set forth *in haec verba* both contracts. The second one contained this language:

> "The consideration for this agreement is the cancellation of agreement dated Feb. 8, 1950 by J. Bradley Streit—which agreement *has been cancelled by separate instrument.*" (R. 14)

It has always been the respondents' contention, which was sustained by the Florida Supreme Court, that the refusal of the petitioners to perform the second contract worked a failure of consideration for the cancellation of the first one and consequently a failure of consideration of the release that was given (R. 205).

Petitioners continually argue that the courts below ignored the release which was signed simultaneously with the execution of the second contract. Petitioners contend that no consideration was given to their rights under this release. This contention is frivolous. The release was only one of the documents which had to be considered by the courts in arriving at a determination of the rights of the parties in this transaction. It was specifically considered along with all the other documents and facts. The Chancellor concluded—on the basis of *all the facts* in connection with the execution of the release and the second contract—that the relinquishment of Streit's rights under the first contract was in consideration of the second contract. "The real consideration, however, for Streit's relinquishment of such rights [under the first contract] was the execution on March 9, 1950 (simultaneously with the execution of the release) of a new written agreement . . ." (R. 196).

This finding was accepted by the Florida Supreme Court: "There can be no doubt that these provisions of the second contract were the considerations for releasing defendants from their obligation under the first contract. * * *" (R. 203-204) The determination by the state Supreme Court that the first contract was enforceable since the consideration for the second contract failed does not ignore the release, but is based on the conclusion that the release was executed in consideration of the second contract and should be given no independent force. No Federal question is presented by a state court's determination of the interpretation and effect to be given to a series of related documents. To separate one document from all the other facts and documents in the transaction, as petitioners do, is wholly misleading. The state courts here did not ignore the release as petitioners claim, but considered it along with all the other pertinent facts. Whether or not the first contract was still in effect and enforceable in view of the release and the conditional promise in the second contract was a question of local law. The decision of the state Supreme Court on Florida law on this contract problem is final.

3. It is said that the decree of specific performance made by the Chancellor on November 15, 1951, pursuant to the mandate of the Supreme Court was entered without hearing. This is wholly untrue. Immediately preceding this decree in the transcript under the caption, "Minutes of Proceedings Before Honorable Vincent C. Giblin Regarding Hearing on November 15, 1951," there appears a full record of the hearing (R. 244-252).

4. The petitioners' repudiation of their contracts was attempted to be justified upon the ground that Streit when

he made the first one agreed that the former owners of the property should continue in its management and control. Even if there were evidence of such it would be inadmissible, but the contract itself negatives the thought. It expressly provides:

> "* * * you are to have the right to elect a majority of the board of directors." (Plaintiffs' Exhibit No. 1, R. 126).

5. The bill of complaint, it is said, was brought for the specific performance of a "short sale" because the sellers did not own the property contracted to be sold. This is untrue for the reasons pointed out under number 1. No question of a short sale or the legality thereof was ever raised at any stage of the proceedings in this case either before the Chancellor or the Florida Supreme Court.

8

Office - Supreme Court, U.
FILED
APR 23 1952
CHARLES ELMORE CROPLE
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951

No. 661

C. B. KING, JOHN H. GERKEN and M. F. PAFFORD,
Petitioners,

v.

J. BRADLEY STREIT and A. W. WALLACE, *Respondents.*

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

CLAUDE PEPPER,
Cafritz Building,
Washington 6, D. C.

W. G. WARD,
Dupont Building,
Miami 32, Florida.

T. J. BLACKWELL,
First Federal Building,
Miami 32, Florida.

Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.